



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
120 BROADWAY, NEW YORK, NEW YORK 10271

ELIOT SPITZER
Attorney General

DOCKET FILE ~~ORIGINAL~~ RECEIVED

OCT 19 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
MARY ELLEN BURNS
Assistant Attorney General in Charge
Bureau of Telecommunications and Energy

KEITH H. GORDON
Assistant Attorney General
Vox: (212) 416-8320
Fax: (212) 416-6003
E-mail: Keith.Gordon@oag.state.ny.us

October 19, 1999

Ms Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12 Street SW, Counter TWA 325
Washington, D.C. 20554

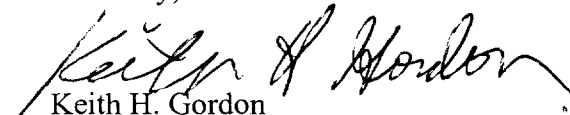
Re: In the Matter of Application by New York Telephone Company, (d/b/a Bell Atlantic-New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region InterLATA Services in New York; CC Docket No. 99-295.

Dear Ms. Salas:

The enclosed comments by New York State Attorney General Eliot Spitzer are hereby submitted pursuant to the Commission's September 24, 1999 Notice of BA-NY's Section 271 filing. An original and six paper copies are being submitted for the commissioners, as well as an electronic version recorded onto a CD-ROM disk. The documents on the CD-ROM disk are: (1) the Attorney General's Office Brief, in Word97 format; and (2) the three Appendices, which have been scanned and converted into Word97 format.

Twelve copies have been forwarded under separate cover directly to Janice Myles in the Common Carrier Bureau.

Sincerely,


Keith H. Gordon
Assistant Attorney General

No. of Copies rec'd
List ABOVE

076

cc: all parties in NYSPSC Case 97-C-0271

For Public Inspection

New York State Attorney General's Comments
Bell Atlantic New York 271 Application
October 19, 1999

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
OCT 19 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Application by New York Telephone Company)
(d/b/a Bell Atlantic-New York), Bell Atlantic)
Communications, Inc., NYNEX Long Distance)
Company, and Bell Atlantic Global Networks,)
Inc., for Authorization to Provide In-Region)
InterLATA Services in New York)

CC Docket No. 99-295

Comments of Eliot Spitzer
Attorney General of the State of New York

Mary Ellen Burns
Assistant Attorney General in Charge
Telecommunications and Energy Bureau

Charlie Donaldson
Keith H. Gordon
Assistant Attorneys General
of counsel

New York State Attorney General's Office
Telecommunications and Energy Bureau
120 Broadway
New York, NY 10271
(212) 416-6343
FAX (212) 416-8877
E-mail: mary.burns@oag.state.ny.us
charlie.donaldson@oag.state.ny.us
keith.gordon@oag.state.ny.us

October 19, 1999

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY OF ARGUMENT	1
THE NEW YORK STATE ATTORNEY GENERAL'S INTEREST	4
ARGUMENT	5
I. The Commission Must Be Satisfied That The Local Exchange Market Is Fully And Irreversibly Open To Competitive Entry Before Granting BA-NY's Application.	5
II. The Existence Of Numerous CLEC Lines In BA-NY's Local Market Does Not By Itself Demonstrate That The Market Is Fully And Irreversibly Open.	6
III. The Evidence Does Not Indicate That BA-NY Has Satisfied Each Of The Checklist Requirements As Of The Date Of Filing.	10
A. Competitive Access To BA-NY's Unbundled Network Elements Is Not Yet Fully Available.	10
1. BA-NY Has Not Shown That It Flows Through CLEC UNE Orders So As To Provide Nondiscriminatory Access.	11
2. BA-NY Has Not Shown That It Provides CLECs Nondiscriminatory Access To Stand Alone Local Loops.	14
a. Stand Alone Unbundled Local Loops.	14
b. xDSL Loops.	15
B. Change Control Must be Provided If BA-NY's Systems Are To Be Available To Competitors.	17
C. Consumers Who Change Local Telephone Service Providers Should Not Be Removed From Directory Assistance Or Listings.	18
D. BA-NY's Performance Measurements As Of The Date Of Application Do Not Show That BA-NY Is Fully Compliant With The Checklist.	20

1.	Actual Performance Data Are An Excellent Indicator Of Whether BA-NY Has Adequately Opened Up Its Bottleneck Services To Competing Entrants Pursuant To Section 271 Provisions.	20
2.	BA-NY's Most Recent Performance Data Show Some Significant Problems Still Remain Unresolved.	22
IV.	The Commission Must Determine Whether The Public Interest Would Be Served By Approving BA-NY's Application.	27
A.	Stronger Anti-Backsliding Measures Are Necessary To Ensure That BA-NY's Local Market Is Irreversibly Open To Competitive Entry.	27
1.	Anti-Backsliding Measures Are Vital To Protect Local Service Competition After BA-NY Is Granted Permission To Offer In-Region InterLATA Service	27
2.	The Proposed Penalty Cap Should More Closely Reflect the BA-NY Profits At Risk In The Local Market.	30
3.	BA-NY's PAP Is Not Self-Executing And Numerous Proposed Waiver Provisions Of The PAP And CCAP Would Undermine The Effectiveness Of Their Anti-Backsliding Protections.	32
4.	The Amount at Risk In BA-NY's Proposed Change Control Plan Is Inadequate.	35
5.	BA-NY's Proposed Anti-Backsliding Plans Depend On Still Unsettled Performance Measures And Have Not Yet been Adopted By The New York Commission.	36
B.	The Public Interest Is Only Served If the Local Market Is Open To Competition Before BA-NY Long Distance Entry Is Permitted.	37
V.	Under The Unique Circumstances Of This Application, The Commission Should Consider Certain New Evidence, Rather Than Reject The Application Based On The Evidence As Of The Date Of Filing.	39
	CONCLUSION	41
	LIST OF APPENDICES	42

INTRODUCTION AND SUMMARY OF ARGUMENT

In the 1996 Telecommunications Act,¹ Congress sought “to open the local services market to competition and ultimately to permit all carriers, including those that had previously enjoyed a monopoly or competitive advantage in a particular market, to provide a variety of telecommunications offerings.”² In furtherance of this goal, Congress not only required all telecommunications carriers to interconnect their facilities and equipment, but also imposed special obligations on incumbent local exchange carriers to make their bottleneck facilities available to others.³

Congress also addressed the status quo with regard to the Bell Operating Companies (“BOCs”), who were prohibited from entering the market for the provision of in-region interLATA services under the terms of the Modified Final Judgment,⁴ but who still enjoy an historic monopoly in the provision of local exchange services. Recognizing the BOCs’ “continued and extensive market dominance,”⁵ and that “it would not be in the BOCs’ immediate

¹ Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56 (1996), codified as 47 U.S.C. §151 et seq. (“the Act” or “the Telecom Act”).

² *In the Matter of the Application of BellSouth Corporation et al., for Provision of In-region, InterLATA Services in Louisiana*, CC Docket No. 98-121, *Memorandum Opinion and Order*, 13 FCC Rcd. 20599, ¶ 3 (October 13, 1998) (“*Louisiana I*”).

³ Telecom Act §§ 251, 252.

⁴ *United States v. American Telephone and Telegraph Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff’d. sub nom., Maryland v. United States*, 460 U.S. 1001 (1983).

⁵ *Louisiana II*, ¶ 3.

self-interest to open their local markets,”⁶ Congress offered a carrot and a stick. The BOCs would remain prohibited from entering the long distance market, but could free themselves from this constraint by opening up their local exchange markets to competitive entry. Section 271 of the Act contains the mechanism and the standards through which the BOCs’ local exchange markets can be opened to competitive entry, after which the long distance market can gain additional BOC competitors, thus moving towards Congress’ ultimate goal of deregulated, competitive markets in all areas of telecommunications services.⁷

New York Telephone Company, d/b/a Bell Atlantic-New York (“BA-NY”), seeks approval from the Federal Communications Commission (“the Commission”) to enter the long distance market. In order to succeed in its application, BA-NY must show that its local exchange market in New York State is open to competitive entry pursuant to the 14-point checklist in Section 271, that it complies with the separate affiliate provisions of Section 272, and that approval of its application serves the public interest, convenience, and necessity.⁸

The New York State Attorney General (“NYSAG”) believes that BA-NY has filed a very strong application, certainly the strongest to come before the Commission to date. Nevertheless, while the Commission has indicated that it will limit its consideration to evidence of conditions

⁶ *Id.*

⁷ Telecom Act, § 271; *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, As Amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, *Memorandum Opinion and Order*, 12 FCC Rcd. 20543, ¶ 19 (August 19, 1997)(“*Michigan*”).

⁸ §§ 271(c)(2)(A) and (B); § 271(d)(3)(C); § 272.

as they stand on the date of application filing, the record in this case is not complete. We are concerned that BA-NY may not be able to demonstrate, by a preponderance of the evidence, that its local market is open to competitive entry as of the date of filing. In particular, the record as of the date of filing shows that a few highly significant deficiencies still remain in BA-NY's provision of bottleneck services to competing providers, as reflected in the most recent available performance data, especially with regard to the unbundling of network elements.

Second, the evidentiary record as of the date of filing indicates that certain significant matters remain unresolved. These include the finalization of BA-NY's proposed Performance Assurance Plan and Change Control Assurance Plan ("PAP/CCAP") which are the anti-backsliding plans proposed by BA-NY, and of important new performance standards contained therein. BA-NY offered significant amendments to the plans five days before filing this application. The NYSAG believes that these crucial anti-backsliding provisions, as currently proposed, still need to be modified and strengthened in order to be effective in keeping the market irreversibly open.

While the public interest would not be served by a premature approval of this application, neither would it be served by a rejection if new evidence could verify, during the 90-day pendency of the application, that the New York local market is indeed open as of that time. The process before the New York State Public Service Commission ("NYSPSC") has been iterative and ongoing. Given the continuing close supervision of the NYSPSC, the degree to which the application is "almost there," and the actual and expected existence of concrete new evidence, the Commission should make an exception to its prior practice in Section 271 proceedings. It should

consider specific material evidence that has or will come in after the date of filing in making its determination, so long as that evidence is presented with sufficient time to be fairly considered by the Commission, consists of new objective data submitted by the NYSPSC, and the parties have an opportunity to comment on it.

In particular, the Commission should consider (1) the performance data for September 1999, which will be available at the NYSPSC on or around October 25, 1999; and (2) anti-backsliding plans expected to be approved by the NYSPSC at their public session on October 27, 1999 (including adoption of the new metrics BA-NY proposed for the amended PAP/CCAP, which address flow through, hot loop cuts and DSL loop provisioning). If that additional evidence permits the Commission to determine that the New York local exchange market is fully and irreversibly open to competition, it would be in the public interest to consider it. Such a procedure would give BA-NY an expeditious chance to obtain entry into the long-distance market, if it is then warranted, rather than face possible rejection on the record as of September 29. It would also assure that New York's residents and businesses obtain a local exchange market open to competitive entry.

THE NEW YORK STATE ATTORNEY GENERAL'S INTEREST

The NYSAG is an advocate on behalf of New York consumers and of residential and small business telecommunications customers, as well as an enforcer of federal and state antitrust laws and consumer protection statutes. The NYSAG has been an active party to the proceedings in this matter before the NYSPSC. Opening up the local exchange market in New York State would be of tremendous benefit to New York residents and businesses and to the economy of the

State, as would the entry of another major competitor offering long distance service in New York. At the same time, if approval for long distance entry is won before the local market is fully and irreversibly open, all New Yorkers, especially residential and small business customers, would be the losers.

In its comments, the NYSAG will address only those matters in BA-NY's application as to which it has current concerns based on the evidence presented. If other matters are put in issue by the other commenters, or new evidence is presented, we reserve the right to comment in our reply.

ARGUMENT

I. The Commission Must Be Satisfied That The Local Exchange Market Is Fully And Irreversibly Open To Competitive Entry Before Granting BA-NY's Application.

We agree with the analysis propounded by the United States Department of Justice ("DOJ") in its prior statutorily-required evaluations of Section 271 applications that the local market must be fully and irreversibly open to competition before an application can be approved.⁹ Section 271 recognizes that BOCs such as BA-NY control bottleneck services required by competing providers in order to compete effectively or at all. Control of these services constitutes a significant barrier to entry in the local market, a barrier which Section 271 is designed to eliminate.¹⁰

⁹ § 271(d)(2)(A); *See, e.g., Louisiana II*, ¶ 16, and DOJ Evaluation cited therein.

¹⁰ *See, e.g., Michigan*, ¶¶ 10-14.

The 14-point checklist set forth in Section 271 identifies those bottleneck services which BA-NY must provide on a nondiscriminatory basis in order to show that its local market is fully open to competitive entry. That checklist must be "fully implemented" by BA-NY in order to satisfy Section 271 requirements.¹¹

The Commission has stated that Section 271 requires that the market be irreversibly open as of the date of filing of an application for long-distance entry; that the BOC applicant must present a *prima facie* case that the market is so open; and that it bears the burden of proving, by a preponderance of the evidence, that it has met the requirements of Section 271 in every respect.¹²

II. The Existence Of Numerous CLEC Lines In BA-NY's Local Market Does Not By Itself Demonstrate That The Market Is Fully And Irreversibly Open.

BA-NY begins its application by touting the number of lines in service in its New York market that are provided by competing local exchange carriers ("CLECs").¹³ The statistics provided by BA-NY are useful to indicate that it has met the minimal threshold requirements to proceed under the "Track A" portion of Section 271.¹⁴ But BA-NY reaches further. BA-NY asserts that its description of the local market reflects that it is "irreversibly" open.¹⁵ In essence, BA-NY argues that the line counts are a substitute for an analysis of whether BA-NY is

¹¹ § 271(c)(2)(B); *Michigan*, ¶ 105; *Louisiana II*, ¶ 49.

¹² *Louisiana II*, ¶¶ 51-59.

¹³ *BA-NY Application, Brief*, pp. 1, 56-60.

¹⁴ § 271(c)(1)(A).

¹⁵ *BA-NY Application, Brief*, p. 4.

providing interconnection and nondiscriminatory access to its bottleneck facilities under Section 271's 14-checklist. BA-NY reaches too far.

In its Section 271 evaluations, the DOJ has stated that "broad-based entry [into the local market] through each of the entry paths contemplated by Congress" is the "best evidence" that the market is open.¹⁶ But the data regarding the New York local market does not meet that appropriately high standard. In particular, the data does not show broad-based entry, nor does it show broad-based entry through all three modes of entry, nor does it show that residential customers are being served by competing providers in any number. Finally, it does not demonstrate by itself that barriers to competitive entry have been eliminated or that the requirements of Section 271 have been met, in particular the opening up of BA-NY's control of bottleneck services in compliance with the 14-point checklist.

BA-NY asserts that in its franchise territory there are some 1.1 million CLEC lines currently in service exchanging approximately 2.5 billion minutes of local traffic per month with BA-NY.¹⁷ However, the number of CLEC lines is only part of the picture. It must be seen in

¹⁶ *Evaluation of the United States Department of Justice, Application of SBC Communications, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in the State of Oklahoma*, CC Docket No. 97-121 (filed May 16, 1997) ("DOJ Oklahoma Evaluation,") p. 43.

¹⁷ In the analysis that follows we use BA-NY's numbers on CLEC lines in service as stated but take no position as to the accuracy of the numbers or the description of the nature of the CLEC lines. The CLECs are in the best position to provide evidence as to the accuracy of BA-NY's numbers for CLEC lines in service and for the characterization of the nature of the lines. However, there are indications in BA-NY's *Application* that some of the numbers given for CLEC lines may be problematic. Compare *Application*, Appendix A, Volume 5, *Declaration of William C. Taylor*, ("Taylor Declaration") Attachment A, Exhibits 6, 7 & 8, with Table 1 at page 1 of the same Attachment. Table 1 gives the total number of CLEC lines as 1,118,180. The

comparison to the number of lines BA-NY has in service. We have been unable to locate figures in BA-NY's filing for the number of BA-NY lines in service. The public record indicates that as of year end 1998 BA-NY had at least 11.2 million lines in service in New York.¹⁸ If BA-NY has not added lines in 1999, the company's numbers would indicate that CLECs today provide around 8.9% of the lines in BA-NY's franchise territory. This number does not demonstrate broad-based local service competition in BA-NY's franchise territory.

Breaking down BA-NY's numbers for CLECs by type of customer reveals that residential customers have the least choice of competitive local providers. BA-NY states that CLECs provide 237,000 residential lines,¹⁹ but does not indicate the number of residential lines BA-NY serves. The public record indicates that at year end 1998 BA-NY had some 7.5 million residential lines.²⁰ Assuming conservatively that BA-NY has not added any residential lines in 1999, BA-NY's figures would indicate that CLECs today provide just 3.1% of the residential

combined total number of CLEC lines stated on the three Exhibits is 1,162,648, or 44,468 more CLEC lines than the total stated on Table 1. The explanation for the discrepancy appears to be that BA-NY's number for total CLEC facilities-based lines (651,793) stated on Table 6 and the total number of CLEC lines using UNEs stated on Table 7 both include lines employing BA-NY loops. If so, the number BA-NY uses for CLEC facilities-based lines includes some lines that depend on BA-NY loops to reach CLEC customers.

¹⁸ *Annual Report of New York Telephone Company for the Year Ended December 31, 1998 to the State of New York Public Service Commission* ("1998 BA-NY NYSPSC Annual Report"), at p. 96 shows that as of year end 1998 BA-NY had 11,599,841 residential, business and pay phone lines in service in New York.

¹⁹ *Taylor Declaration*, Attachment A, p. 2.

²⁰ *1998 BA-NY NYSPSC Annual Report*, p. 96.

lines in its franchise territory.²¹ This number does not demonstrate broad-based local competition in BA-NY's franchise territory.

As to number of minutes for calls between BA-NY and CLEC lines, this number by itself tells us nothing about the state of local competition. For one thing, BA-NY's filing does not appear to contain figures for the number of minutes for calls in which only BA-NY lines are involved. Thus the number of CLEC minutes of use has no context. Also, BA-NY does not indicate what proportion of calls originate from its own lines, what proportion of calls originate from CLEC lines, or whether a majority or large portion of the usage involves a limited number of CLEC lines.

Rather than showing broad-based local competition in New York through all modes of entry, for both residential and commercial customers, BA-NY's filing and publicly available information describe a telephone service market in which there is limited competition in general and much less competition for residential customers. The evidence of local competition in New York therefore underscores that the Commission must examine closely whether BA-NY has met all the requirements of Sections 271 and 272, including the 14-point checklist and whether the public interest would be served by approval of BA-NY's application.

²¹ It is highly likely that only a minimal number of these residential CLEC lines are facilities-based. While we only have the redacted version of the BA-NY Brief, its description of the number of facilities-based CLEC lines must be carefully scrutinized, since it does not always distinguish between residential and business lines, or between actual numbers of subscriber lines versus the mere availability of service. *See BA-NY Application, Brief*, pp.6-8.

III. The Evidence Does Not Indicate That BA-NY Has Satisfied Each Of the Checklist Requirements As Of The Date Of Filing.

A. Competitive Access To BA-NY's Unbundled Network Elements Is Not Yet Fully Available.

The heart of Section 271 is the 14-point competitive checklist which sets forth all the requirements for access and interconnection that Congress deemed essential for local BOCs to provide to competitors. In order to receive Section 271 approval, each item of the checklist must be satisfied; any item not found to be satisfied constitutes an independent ground for denial.²² Each checklist item must also be available "as a practical matter," not just on paper.²³ Among the checklist requirements is that BA-NY must provide its competitors with nondiscriminatory access to unbundled network elements ("UNE").

The UNE mode of entry is proving to be an increasingly important way to offer competitive services in New York, especially residential service.²⁴ For this reason, the remaining problems with BA-NY's provision of access to UNEs, if unresolved, will have a significant impact on competition and consumer choice in the New York local exchange market. There appear to be three major remaining problems with UNEs.

²² *Louisiana II*, ¶ 50.

²³ *See Louisiana II*, ¶ 56.

²⁴ *See Point II, supra*. As BA-NY's application shows, most of the few CLEC residential lines in service in the NY local market are currently and recently provided through the UNE mode of entry. *See BA-NY Application, Brief*, pp. 4-8, and attachments thereto. The Performance Assistance Plan recognizes the increasing importance of UNEs by heavily weighting the amount of bill credits towards that mode of entry. *See, e.g., BA-NY Application, Dowell-Canny Declaration*, ¶ 127.

1. BA-NY Has Not Demonstrated That It Flows Through CLEC UNE Orders So As To Provide Nondiscriminatory Access.

BA-NY's operation support systems ("OSS") must process orders for UNEs in a nondiscriminatory manner to comply with Section 271.²⁵ In prior Section 271 applications, the Commission has looked closely at the functionality of OSS, including how well and to what degree CLEC orders are processed electronically rather than manually, and whether the OSS can handle current demand, reasonable fluctuations in demand, and reasonably foreseeable demand volume.²⁶

Ordering UNEs, such as switching, the local loops to connect telephone service to a premises, and customer service features, is an integral step in CLEC use of UNEs. For local competition to be effective, CLECs must be able to order UNEs on the same basis as an incumbent local telephone company orders the equivalent elements for its customers. If an incumbent local company can process such orders quicker and with more accuracy for itself than it does for competitors, the incumbent would have an enormous competitive advantage. Consequently, if BA-NY is able to enter an electronic order for an element, a CLEC that wishes to use the same element to service its customer must also be able to place an electronic order for

²⁵ *Louisiana II*, ¶ 138. To show compliance with Section 272, BA-NY must also show that it provides CLECs the same service BA-NY provides to its affiliates.

²⁶ See *Louisiana II*, ¶ 139; *Michigan*, ¶¶ 138, 198, 199; *In the Matter of Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in South Carolina*, Memorandum Opinion and Order, 13 FCC Rcd 539, ¶¶ 107, 142, 143 (December 24, 1997) ("South Carolina").

an equivalent UNE so that its order has the same chance of being processed electronically as an order placed by BA-NY.

BA-NY's ability to process CLEC UNE orders electronically using its OSS is measured in the set of performance metrics the NYSPSC has established for the company. For CLEC UNE order processing the NYSPSC metrics contain three monthly measurements that differ in the type of UNE orders involved.²⁷

The first measurement, OR-5-01: % Flow Through - Total, is intended to measure what percentage of the total CLEC UNE orders in any given month BA-NY processes electronically through its OSS. There are many different types of UNEs, some of which BA-NY's OSS is not currently capable of processing electronically.

The second measurement, OR-5-02: % Flow Through - Simple, is intended to measure what percentage of the CLEC UNE orders not involving complex services BA-NY actually processes electronically through its OSS.

The third measurement, OR-5-03: % Flow Through Achieved, is intended to measure what percentage of these CLEC UNE orders that are designed to flow through BA-NY's OSS electronically, BA-NY actually processes electronically through its OSS.

The report on BA-NY's processing of CLEC UNE orders in August 1999, the latest data currently available, indicates that BA-NY falls far short of processing such orders in a way that

²⁷ *August 1999 Carrier to Carrier Performance Standards and Reports, Bell Atlantic-New York State ("August C2C Report")*. A copy of the *August C2C Report* is contained in the *BA-NY Application* at Attachment D, *Joint Declaration of George S. Dowell and Julie A. Canny*, pp. 96 - 108 ("*Attachment D, Dowell/Canny Declaration*").

would enable a CLEC employing UNEs to compete effectively with BA-NY. The report indicates that in August 1999 BA-NY processed electronically 59.28% of all the UNE orders CLECs placed with the company, 60.42% of the simple orders and 73.06% of the CLEC UNE orders designed to be processed electronically through BA-NY's OSS.²⁸

These measurements for local competition are significant because the reported data puts into question whether CLECs ordering UNEs that BA-NY cannot process electronically will be at a competitive disadvantage to BA-NY. While it has not yet approved a standard by which to judge BA-NY's performance under the first two UNE order processing metrics, the NYSPSC has established a processing rate of 99% as the standard by which to judge the third metric, which measures BA-NY processing of CLEC UNE orders that are designed to be processed automatically by BA-NY's OSS.²⁹ Rather than meeting the established standard of 99% for this metric, in August 1999 BA-NY processed electronically just 73% of such orders.³⁰

Since CLECs are in the best position to present evidence of whether BA-NY's processing of UNE orders puts them at a competitive disadvantage, it is likely that the CLECs will submit evidence to the Commission on this issue. We reserve the right to comment on this issue in reply, should it be so raised, and to offer further argument at that time about whether BA-NY is meeting the requirements of the competitive checklist for CLEC OSS UNE order processing.

²⁸ *August 1999 C2C Report*, Metric OR-5-01: % Flow Through - Total, *Attachment D, Dowell/Canny Declaration*, p. 102.

²⁹ *Ibid.*

³⁰ *Ibid.*

2. BA-NY Has Not Shown That It Provides CLECs Nondiscriminatory Access To Stand Alone Unbundled Local Loops.

a. Stand Alone Unbundled Local Loops.

The unbundled local loop is a network element BA-NY must provide CLECs on a nondiscriminatory basis pursuant to Section 251(c)(3).³¹ It is also a checklist item under Section 271(c)(2)(b)(iv).³² In order to make a *prima facie* case that it is providing CLECs stand alone unbundled local loops in a nondiscriminatory manner, BA-NY must demonstrate that it “provides access for the provisioning and ordering of unbundled local loops sufficient to allow an efficient competitor a meaningful opportunity to compete”³³ and that it “can provide loop cut overs based on a reasonably foreseeable demand in a timely and reliable fashion”³⁴ with “a minimum of service disruption.”³⁵

BA-NY implies in its application that stand alone unbundled local loops are an insignificant means for CLECs to compete in New York, urging that such loops are a “small subset” of UNEs.³⁶ The CLECs will likely indicate that they do not agree with BA-NY’s assessment, because the use of stand alone unbundled local loops enables a CLEC to serve small

³¹ *Louisiana II*, ¶ 185.

³² *Id.*, ¶ 184.

³³ *Id.*, ¶ 192.

³⁴ *Ibid.*

³⁵ *Id.*, ¶ 185.

³⁶ *BA-NY Application, Brief*, p. 17.

and medium size business customers without the CLECs having to go to the significant expense and delay involved in building its own physical connection to a customer's premises.

BA-NY's ability to provision stand alone unbundled local loops on time and with minimum service disruption has been and continues to be a major issue between the CLECs and BA-NY. As BA-NY acknowledges, CLECs have disputed BA-NY's claims that it provides CLECs nondiscriminatory access to stand alone unbundled local loops.³⁷ CLECs continue to raise the issue of whether BA-NY is providing nondiscriminatory access to stand alone unbundled local loops before the NYSPSC. Since the CLECs are in the best position to identify problems with BA-NY's service performance, it is likely that in this proceeding they will contest BA-NY's description of its stand alone unbundled local loop provisioning. We reserve the right to comment on this issue on reply should it be so raised, and to offer further argument at that time about whether BA-NY is meeting the requirements of the competitive checklist for this UNE.

b. xDSL Loops.

In addition to stand alone unbundled local loops for conventional telephone services, BA-NY supplies such lines to CLECs for their use in providing Digital Subscriber Line ("xDSL") service. Included in checklist items 2 and 4 is the requirement that BA-NY make available unbundled access to xDSL loops needed for the provision of high-speed Internet access and other high-speed data services.³⁸ The competitive deployment of such high-speed services is

³⁷ *BA-NY Application, Brief*, p. 18, fn. 19.

³⁸ *Louisiana II*, ¶¶ 184, 187.

increasingly important to New Yorkers as the demand for such access grows rapidly.

BA-NY acknowledges that providing stand alone unbundled local loops for xDSL is new and still under development.³⁹ As with BA-NY's provisioning of stand alone unbundled local loops for conventional telephone services, CLECs have vigorously contended that they do not have nondiscriminatory access to such lines. In particular, CLECs have contended that BA-NY has withheld equal access to information the CLECs need to determine a line's suitability for xDSL, information they deem essential to compete effectively as a provider of xDSL service. BA-NY asserts that it has provided CLECs nondiscriminatory access to stand alone unbundled local loops⁴⁰ and that it is taking actions to provide CLECs new services to improve the CLECs' ability to install xDSL.⁴¹

CLECs continue to raise before the NYSPSC the issue of whether BA-NY is providing nondiscriminatory access to loops used for xDSL. Since CLECs are in the best position to identify problems with BA-NY's service performance on all loops, it is likely that in this proceeding the CLECs will contest BA-NY's description of its provisioning of loops used for xDSL. We reserve the right to comment on this issue on reply should it be so raised, and to offer further argument at that time about whether BA-NY is meeting the requirements of the competitive checklist for this UNE.

³⁹ *BA-NY Application, Brief*, p. 19.

⁴⁰ *Id.*, p. 18.

⁴¹ *Id.*, p. 20.

B. Change Control Must Be Provided If BA-NY's Systems Are To Be Available To Competitors.

For local service competition to be effective, BA-NY must provide CLECs advanced notice of changes in BA-NY's systems and procedures to which CLECs need access, in particular to changes in the company's operations software. To make such notice effective, BA-NY must provide the CLECs a means of testing their responses to such changes before putting the responses to work. If BA-NY does not give adequate notice and an opportunity to test, CLECs and their customers will inevitably suffer problems and delays when CLEC facilities, especially CLEC computer systems, are unable to communicate with BA-NY's systems because BA-NY has changed the way its systems work. Change control affects virtually every item in the competitive checklist.

BA-NY contends that it provides such change control and an adequate testing environment.⁴² BA-NY's change control has been an issue before the NYSPSC, where the CLECs have contended that BA-NY has not provided the CLECs adequate notice of changes or an adequate facility to test their responses to such BA-NY changes.

BA-NY has made significant efforts to address change control and indicates that just before filing its application it opened a new facility for CLECs to test responses to BA-NY changes.⁴³ The CLECs are in the best position to identify problems with BA-NY's service with regard to change control. Because CLECs may contest BA-NY's provision of change control,

⁴² *Id.*, p. 48.

⁴³ *BA-NY Application, Declaration of Stuart Miller and Marion C. Jordan*, p. 46, ¶ 106 ("Miller/Jordan Declaration").

we reserve the right to comment on this issue in our reply should it be so raised, and offer further argument at that time about whether BA-NY is meeting the requirements of the competitive checklist items affected by change control.

C. Consumers Who Change Local Telephone Service Providers Should Not Be Removed From Directory Assistance Or Listings.

Nondiscriminatory access to directory assistance and listings is a competitive checklist requirement under items 7 and 8.⁴⁴ The question is whether BA-NY provides such access in a way that allows CLECs to compete effectively.

BA-NY acknowledges that when a company customer switches to a CLEC that provides service through its own switch and the customer's existing BA-NY local loop, BA-NY procedure calls for first delisting the customer from BA-NY's directory listing and assistance database and then issuing an order that restores the customer to that database.⁴⁵ This means that if BA-NY for some reason fails to restore the customer's listing to BA-NY's directory assistance database, inquiries to a BA-NY Directory Assistance operator for the customer's telephone number will receive the response that there is no listing for that customer.

Being removed from the directory assistance database would be a significant inconvenience for any telephone service customer. For a business, being dropped from directory assistance could have obvious financial consequences if a potential or even an existing customer is told that the business is not listed.

⁴⁴ § 271(c)(2)(B)(vii), (viii).

⁴⁵ *BA-NY Application, Brief*, pp. 30-31.

The anticompetitive impact of dropping a customer from directory assistance and listings is also obvious, since a CLEC customer who suffers as a result of such a delisting may feel so disadvantaged that the customer cancels the switch to the CLEC, even though the problem originated with BA-NY.⁴⁶

BA-NY asserts that it has made changes to its procedures to ensure that it rarely drops listings from its directory assistance database.⁴⁷ CLECs have contended before the NYSPSC that BA-NY's delisting - relisting process when it switches lines to the CLECs has, in fact, led to a significant number of listings being dropped from BA-NY's directory assistance database for significant periods.

Because CLECs are in the best position to provide evidence of whether BA-NY is providing directory assistance and listing in a way that allows the CLECs to compete effectively, the CLECS may contest whether BA-NY's provision of such service is nondiscriminatory. We reserve the right to comment on this issue in our reply should it be so raised, and to offer further argument at that time about whether BA-NY is meeting the requirements of the relevant competitive checklist items. Such a determination would be materially aided if BA-NY can provide evidence to show that its procedures do not involve even the possibility of a customer's being dropped from BA-NY's directory assistance and listing database during a switch to a CLEC.

⁴⁶ *Cf. South Carolina*, ¶¶ 18, 19.

⁴⁷ *BA-NY Application, Brief*, p. 30.

D. BA-NY's Performance Measurements As Of The Date of Application Do Not Show That BA-NY Is Fully Compliant With The Section 271 Checklist.

1. Actual Performance Data Are An Excellent Indicator Of Whether BA-NY Has Adequately Opened Up Its Bottleneck Services To Competing Entrants Pursuant To Section 271 Provisions.

The best gauge of whether BA-NY is providing non-discriminatory access to its bottleneck facilities is how its actual performance stacks up when measured against objective standards.⁴⁸ The Commission has consistently expressed a preference for "actual performance results of commercial usage" as "the most probative type of empirical evidence" to consider.^{49, 50}

Over the past two years, the NYSPSC has developed a considerable body of carrier-to-carrier ("C2C") metrics and standards that are designed to track how well BA-NY's bottleneck services are open to competitors' use.⁵¹ The NYSPSC has required BA-NY to report a

⁴⁸ See, e.g., *Louisiana II*, ¶ 56; *Michigan*, ¶ 22.

⁴⁹ *Louisiana II*, ¶¶ 85, 92; *Michigan*, ¶161.

⁵⁰ *Louisiana II*, ¶ 92. Thus, while the KPMG testing and analysis played an essential role in helping BA-NY identify and resolve numerous technical obstacles to BA-NY's OSS functionality and availability, it is not the primary evidence to be considered in the Commission's assessment of BA-NY's Application.

⁵¹ See, Case 97-C-0139, *Proceeding on Motion of the Commission to Review Service Quality Standards for Telephone Companies, Order Adopting Inter-carrier Service Quality Guidelines*, issued February 16, 1999 and *Order Establishing Permanent Rule*, issued June 30, 1999. Where BA-NY offers a service to its own customers that is comparable to one it provides to the CLECs, the C2C standards are measured by determining if the CLECs received service that is in parity with BA-NY's own similar retail functions. Where no such comparable BA-NY retail service exists, the C2C standards measure BA-NY's service performance to the CLECs against absolute standards designed to ensure competitors are given a meaningful opportunity to compete. The standards that have been adopted by the NYSPSC to date were extensively analyzed by all interested parties in a collaborative process. This effort is ongoing, as a number of additional standards remain under development.

substantial amount of performance measurement data each month, containing hundreds of service metrics concerning pre-order, ordering, provisioning, maintenance and repair, trunking blockage, collocation, and change control.⁵² These reports are required by the NYSPSC's permanent C2C standards adopted on June 30, 1999.⁵³ During the past two years, the NYSPSC held collaborative discussions involving all of the incumbent local exchange providers and CLECs in the state to evaluate and, where possible, to reach an industry consensus on the design of these C2C measures, and what performance standards should be required of the incumbent local service providers. Where no consensus was achieved, the NYSPSC established standards.⁵⁴

BA-NY's PAP/CCAP⁵⁵ incorporate a subset of the entire C2C metrics list which has been selected to identify those significant metrics which, if not performed adequately after the local market is deemed open, would result in BA-NY paying penalties to the CLECs to compensate them for anticompetitive behavior by BA-NY. Within this subset of metrics, the BA-NY PAP/CCAP also weighs each metric according to its relative significance when compared to the

⁵² See, e.g., *Dowell/Canny Declaration Attachment D*, pp. 1-108, which detail BA-NY's monthly C2C performance results from October 1998 through August 1999 (the September monthly data will not become available until October 25, 1999).

⁵³ NYSPSC Case 97-C-0139, *supra*. Prior to this date, there were interim guidelines setting forth many of the current metrics and standards.

⁵⁴ See, NYSPSC Case 97-C-0139, *Order Establishing Permanent Rule*, *supra*.

⁵⁵ *Attachment C, Dowell/Canny Declaration* contains BA-NY's September 24, 1999 *Petition for Approval of the Amended Performance Assurance Plan and Amended Change Control Assurance Plan for Bell Atlantic - New York* ("PAP/CCAP Petition"). The PAP is set forth as Exhibit 1 to Attachment C, and the CCAP is Exhibit 2 to Attachment C.

remaining penalty metrics.⁵⁶ There are six measurement weights, from highest to lowest: 20, 15, 10, 5, 1, and 0 (the lowest two categories signify either measurements still being developed and evaluated, or which are useful primarily as added analysis of companion measurements which have more weight assigned). Attached NYSAG Appendix A lists all of the metrics by mode of entry and the weights assigned to each one. Those weighted either 20 or 15 are noted with an asterisk in the right margin.

2. BA-NY's Most Recent Performance Data Shows Some Significant Problems Still Remain Unresolved.

By and large, BA-NY's monthly performance data shows that the company has made significant improvement in supplying bottleneck services to CLECs. This is borne out by a review of the October 1998 through August 1999 data included with the BA-NY application.⁵⁷ Due to the iterative nature of the process that has transpired under the supervision of the NYSPSC, BA-NY has been confronted early on by its performance shortcomings as revealed by KPMG's third party testing, CLEC concerns and the monthly data. This has served a very useful purpose in aiding all parties to focus on what problems need to be corrected, and subsequent performance data has served to test whether the remedies applied were successful in bringing BA-NY's service up to the necessary standards.

⁵⁶ See, Attachment C, Exhibit 1, Appendix A, Dowell/Canny Declaration.

⁵⁷ See, Attachment D, Dowell/Canny Declaration, pp. 1-108.